# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 956

HOWARD WEISBLUM, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 20, 1968. A petition for rehearing was denied on January 10, 1969. The petition for a writ of certiorari was filed on January 18, 1969, invoking

the jurisdiction of this Court under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion to withdraw his guilty plea.

## STATEMENT

On March 28, 1966, a federal grand jury in the United States District Court for the Eastern District of New York returned an indictment charging petitioner with draft evasion and with causing the submission of false and fraudulent statements to his local draft board, in violation of 50 U.S.C. App. 462(a). In February 1968, petitioner was tried by a jury before Judge Weinstein. During the trial, Count I of the indictment was dismissed; but the jury returned a guilty verdict on Count II, which charged that petitioner was falsely represented as being a member of the Armed Forces Reserves. At the trial petitioner admitted that he agreed to pay a co-conspirator $3500 to keep him from going into the service.

On April 1, 1968, Judge Weinstein granted petitioner's motion to set aside the verdict on the ground that the government's summation to the jury was prejudicial.

The case was scheduled for retrial on April 18, 1968. At that time, however, petitioner was granted a substitution of attorneys, and a request for an adjournment by new counsel was granted.

On May 2, 1968, the case was called before Judge Bruchhausen. At that time petitioner changed his plea from not guilty to guilty. Before accepting the plea of guilty Judge Bruchhausen conducted a searching inquiry and determined that petitioner was aware of his rights and understood the nature of the charge, and that no threats or promises had been made to induce him to plead guilty (see the minutes of plea hearing).

On June 13, 1968, petitioner appeared before Judge Zavatt for sentencing. He requested that sentencing be adjourned, initially on the ground that he was being examined by a private psychiatrist who needed additional time to complete his report and that this report might be of value to the court in fixing a sentence. Judge Zavatt noted that nothing in the probation report indicated that there was anything wrong with petitioner, but since the issue had been raised, he stated that he would commit petitioner under 18 U.S.C. 4208(b) for examination and report before imposing a definite sentence (R. 2).[1] Counsel then unsuccessfully suggested that sentencing be postponed until that afternoon (R. 6). At that point, petitioner personally objected that one of the prosecuting attorneys had assured him that his sentencing would be delayed (R. 6). It was then developed that the prosecutor had indicated that he would have no objection if the matter of sentencing were not to come up until the summer, because petitioner suggested that his father,

[1] Record references are to the minutes of the sentencing hearing.

who suffered from a heart condition, would be adversely affected if petitioner could not attend his brother's wedding on June 20, 1968 (R. 6-11). In denying the application on these grounds the court stated (R. 9):

> You know, you are changing the story. A moment ago you were talking about his psychiatric problems, then promises were made by the United States Attorney, I called him down. Now we hear something about a wedding of a brother.

Only after these applications had been denied did petitioner, himself, move to withdraw his plea of guilty, objecting: "then, Your Honor, I wish to change my plea * * *" (R. 11). Deeming the grounds insufficient, the court denied the request. Petitioner's counsel then offered a "different ground" for withdrawing the guilty plea, explaining that during the noon recess, he had consulted petitioner's private psychiatrist and that the psychiatrist had reached a tentative opinion that petitioner may not have been mentally competent at the time of his plea of guilty on May 2, 1968 (R. 11-13). The court denied the motion to withdraw the plea of guilty and committed petitioner under 18 U.S.C. 4208(b) for a "thorough psychiatric and psychological report" before imposing a definite sentence (R. 13).

## ARGUMENT

In the circumstances of this case, the trial court did not abuse its discretion in denying the motion to withdraw the plea of guilty, made after the defendant had unsuccessfully endeavored on several grounds to have his sentence postponed and only then sought to with-

draw the plea. The plea of guilty in this case had obviously been knowingly entered after due deliberation. Petitioner had been through one trial. He had, as the petition states (Pet. 3-4), testified for the government in another case with respect to the scheme to have it appear that petitioner was a member of the reserves. The plea was entered after petitioner's new counsel had been given an adjournment to prepare for trial. It was not accepted until the judge had made a thorough inquiry as required by Rule 11, F.R.Crim.P. In none of these proceedings was there any suggestion that petitioner was not competent to consult with counsel or to understand the proceedings. The court below was on firm ground in upholding the district court's treatment of "this belated claim" as "merely an afterthought which required no further consideration" (Pet. App. 12).

A defendant has no absolute right to withdraw a guilty plea, even before sentence. *United States* v. *Giuliano*, 348 F. 2d 217 (C.A. 2), certiorari denied, *sub nom. Prezioso* v. *United States*, 382 U.S. 939; *Zaffarano* v. *United States*, 330 F. 2d 114 (C.A. 9), certiorari denied, 379 U.S. 825. Here, however, petitioner did not move to withdraw his plea of guilty until after his attempts to have sentencing postponed on various grounds had failed *and* the court had indicated that it would commit petitioner for study and report under 18 U.S.C. 4208(b). Thus, under the circumstances, the motion to withdraw the plea was essentially in the posture of a motion after, rather than before, sentence. Under Rule 32(d), F.R.Crim.P., a post-sentence motion to withdraw a guilty plea may

be granted only "to correct manifest injustice." This record presents no hint of injustice, and accordingly the district judge acted within his discretion in refusing to permit the plea to be withdrawn.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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